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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. ~~1104~~ 205

E. R. BORGMEIER,

Petitioner,

vs.

HELEN N. FLEMING, WILLIAM J. NEWMAN, JR., MARGARET N. WALSH, RICHARD P. NEWMAN, JOSEPHINE N. KRUG, ADELAIDE LOIACANO, and WILLIAM McKAVIS, a minor, by HELEN N. FLEMING, his next friend,

Respondents.

LAKE DELTON DEVELOPMENT COMPANY, a Wisconsin Corporation, RALPH M. HINES, JAMES H. HILL, SR., HILMER C. AMUNDSON and HENRY C. TITUS,

Respondents,

and

JAMES H. HILL, JR., MILLIE M. RISLEY, FRANCES HINES and A. B. BATTY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDMUND J. JOHNSON,
E. R. BORGMEIER,
1889 Ingleside Terrace N.W.
Washington, D. C.,
Attorneys for Petitioner.

E. R. BORGMEIER,
Of Counsel.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, E. R. Borgmeier, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The order entered by the United States District Court for the Western District of Wisconsin, Judge Patrick T. Stone presiding, on November 17, 1955, from which an appeal was taken by petitioner, is not reported, but appears in the record filed with and certified by the

Clerk of the Court of Appeals and transmitted herewith. That order released the sum of $20,000.00 (on deposit with the Clerk of that Court under the provisions of a settlement agreement entered into on September 21, 1955, in the case of Fleming vs. Lake Delton Development Company) "free from any lien of Attorney Eleanore Borgmeier, Esquire" (App. 13-14).

The opinion of the United States Court of Appeals for the Seventh Circuit, granting petitioner a writ of mandamus and prohibition, was filed May 11, 1956. Said opinion determined that petitioner was entitled to appeal, and directed that her appeal from the order entered by the trial court on November 17, 1955, be forwarded for review, and that orders of January 4, 1956, and January 17, 1956, entered against her by the trial court, be expunged from the record, and that the trial court exercise no further jurisdiction over the subject matter of the appeal. This opinion is reported in *Borgmeier v. Stone*, 233 Fed. 2nd. 818, and a copy thereof is set forth in the Appendix hereto.

On the appeal thereupon forwarded, the United States Court of Appeals for the Seventh Circuit reversed the order of the trial court of November 17, 1955, but voluntarily remanded said cause to the Western District of Wisconsin, its opinion being filed February 26, 1957, which is set forth in the Appendix hereto and in the certified copy of the record. Said opinion is reported in 241 Fed. 2nd. 865.

JURISDICTION.

On March 27, 1957, the Court of Appeals ordered that the petition for rehearing be denied. (Said order appears in the Appendix hereto). This petition is filed within 90 days of the denial of the petition for rehearing in the United States Court of Appeals for the Sev-

enth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1); and under Rule 19 (b) of the Rules of the Supreme Court.

QUESTIONS PRESENTED.

I. Did the Court of Appeals err in voluntarily remanding said cause to the District Court to determine the merits of petitioner's claim for attorney's lien?

II. Does this action of the Court of Appeals in voluntarily remanding said cause to the District Court, in view of the repeated acts of the trial judge, and in view of the petitioner's known refusal to submit her attorney's lien to the trial judge for determination, bring this cause within the supervisory provision of Rule 19 (b) of the Rules of the Supreme Court?

III. The point of law raised by the opinion of the Court of Appeals, "What action by a party constitutes a submission to the jurisdiction of the court?", should necessarily be settled by this court, as provided by Rule 19 (b).

STATEMENT OF THE CASE.

On May 21, 1953, petitioner as attorney filed a complaint in the United States District Court for the Western District of Wisconsin on behalf of the heirs of William J. Newman, Sr., of Chicago, Illinois, who died June 2, 1943, to establish a constructive trust in lands, personal property and business enterprises located in Sauk County, Wisconsin, conveyed by said William J. Newman and Margaret Y. Newman, his wife, as well as by other nominees of said W. J. Newman, to the Lake

Delton Development Company (then known as Lake Delton Hotel Company). These conveyances were made on or about August 4, 1936, in accordance with an order entered in the United States District Court for the Northern District of Illinois, Eastern Division, in a proceeding then pending therein under Section 74 of the Bankruptcy Act, entitled "*In the Matter of William J. Newman, Debtor*", Case No. 58252. After the entry of the order directing these conveyances, the reorganization proceeding was converted into a straight bankruptcy.

The lands conveyed at that time (exclusive of the personal property and the many and varied business enterprises, and exclusive of the lands and other assets previously conveyed to the nominees) comprised approximately 2300 acres in the Dells area of Wisconsin, and included the lake known as Lake Delton, and were appraised at the close of the calendar year 1936 at the sum of $764,171.00, as is disclosed by the audit of McMurray Smith & Company for the years 1934-1936, withdrawn in accordance with Judge Stone's order of September 21, 1955 (App. 89-10). Since that time considerable expansion, improvement and development has been had, and the properties and businesses so conveyed have been enhanced greatly, and undoubtedly doubled, in value.

The plaintiffs agreed to pay petitioner as compensation for her services in connection with said suit one-half of any recovery by way of suit, settlement or otherwise, which is the basis of her attorney's charging lien.

The defendants include Mr. Newman's Wisconsin representatives and confidential employees, including the Lake Delton Development Company, his solely-owned corporation; Ralph M. Hines, his Wisconsin manager and president of the Lake Delton Development Company;

James H. Hill, Sr., James H. Hill, Jr., and Erma C. Miller, practicing law at Baraboo, Wisconsin, as Hill, Miller & Hill, his Wisconsin attorneys; Hilmer C. Amundson, his Wisconsin engineer; Henry C. Titus, his bookkeeper until 1936; and others. All of the above named defendants, with the exception of Henry C. Titus, remained in such capacity with Mr. Newman until his death, in 1943. All of the defendants in said cause were represented by Arthur Wickham and Erma C. Miller as their attorneys.

The plaintiffs and their spouses included among their number three attorneys, two of whom, Geoffrey Fleming and Edwin Walsh, are actively practicing law at Chicago, Illinois. Said Geoffrey Fleming, the husband of Helen N. Fleming, represented Mr. Newman as his attorney in the reorganization and bankruptcy proceedings at Chicago, Illinois, above referred to, and subsequent to petitioner's withdrawal as plaintiffs' attorney herein, acted as one of the attorneys for plaintiffs.

During the time that petitioner represented plaintiffs as their attorney, she was compelled to devote her entire time and attention to said suit. As a necessary part of such legal services, she removed her domicile to Sauk County, Wisconsin, during the summer of 1953, where among other duties she made complete examinations and duplications of the books and records at the Recorder's office of Sauk County, Wisconsin, from 1926 to date. She was likewise compelled to attend numerous pretrial examinations of the defendants at Madison and Baraboo, Wisconsin, during the winter of 1953-1954. Thereafter by order duly entered by Judge Stone, the defendants deposited with the Clerk of the District Court at Madison ten (10) transfer cases of documents from the offices of the Lake Delton Development Company

and related companies, and from the law offices of Hill, Miller & Hill, and from the offices of his engineer. There were more than 50,000 of such documents, covering the years 1926-1943, and respondent was obliged to remove her residence and office to Madison, Wisconsin, in order to examine these documents. She examined each of them, and caused them to be numbered for identification, and photostated in excess of 10,000, to be used as evidence in the case. These documents were the basis of her attorney's retaining lien, which was not adjudicated by Judge Stone at any time, but which was called to his attention in petitioner's Special and Limited Appearances filed in the trial court on January 3, 1955 (App. 5; 7) and by copies of the itemized account supporting such retaining lien attached to said Special and Limited Appearances (App. 6; 7). The examination, photostating and assembling of these documents required three months of round-the-clock work, and she was also required to employ help in order to accomplish so much in so short a time.

On September 18, 1954, with the approval of Judge Stone by Order entered that day (App. 4) the appearance of Frank M. Coyne was filed in said proceedings as substituted counsel for Clifford G. Mathys, he then entering the case as resident counsel for petitioner on behalf of plaintiffs.

On October 21, 1954, (after petitioner had been discharged by plaintiffs as their attorney), she served her notice of motion and written motion on all necessary persons to withdraw as attorney for plaintiffs, including the plaintiffs and Frank M. Coyne, and the attorneys for defendants (App. 4). The court originally set said motion for hearing on November 4, 1954, (of which date the plaintiffs were notified by respondent—App. 4); but

was thereafter changed to November 3, 1954, without the knowledge of petitioner. At the hearing held on petitioner's motion (with other motions) on November 3, 1954, the court entered an order permitting petitioner to withdraw her appearance as attorney for plaintiffs.

Notice of the entry of said order was forwarded to plaintiffs by petitioner on November 9, 1954 (App. 5). Thereafter, on November 22, 1954, petitioner filed her withdrawal of appearance as attorney for plaintiffs in accordance with said order entered by Judge Stone on November 10, 1954 (App. 5). The filing of such withdrawal, pursuant to court order, terminated the jurisdiction of the District Court over petitioner, and no jurisdiction was ever thereafter acquired over her by said court.

Shortly thereafter, and prior to December 1, 1954, said Frank M. Coyne, who had been acting as resident counsel only, entered into an independent agreement with plaintiffs, and thereafter with Geoffrey Fleming represented plaintiffs actively as their attorney.

On December 7, 1954, Judge Stone entered an *ex parte* order to show cause against petitioner on affidavit of Geoffrey Fleming, why she should not be compelled to deliver up to plaintiffs or their agents all documents in her possession. Such rule to show cause was never served on her, but she did file her Special and Limited Appearance thereto solely to contest the jurisdiction of the Court (App. 5), and to apprize the Court of her attorney's retaining lien on such documents in the sum of $10,004.96 (App. 5, 6) (which lien did not include any amounts due for services rendered in connection with the *Lake Delton* case). Thereafter, on January 25, 1955, on motion of plaintiffs, Judge Stone entered an *ex parte* order vacating that portion of his order of

November 10, 1954, permitting petitioner to withdraw her appearance, and reinstating her as attorney for plaintiffs, and compelling her to present herself to the Court for such further order as is necessary on February 14, 1955 (App. 6); to which order of January 25, 1955 (dated January 26, 1955) petitioner again filed her Special and Limited Appearance seeking solely to contest the jurisdiction of the trial court over her (App. 7); and subsequent to which date Judge Stone entered his order of February 15, 1955 (App. 7) reinstating her as attorney for plaintiffs and directing her to deposit with the Clerk of the Court all documents in her possession.

Thereafter petitioner filed her Notice of Appeal to the United States Court of Appeals from the order entered by Judge Stone on February 15, 1955 (Notice of Appeal, App. 7); and also filed her appeal bond, Designation of Contents, Statement of Points, and Statement in Accordance with Rule 10 (b); all of which were included in the Record on Appeal herein.

On March 25, 1955, Judge Stone, on the court's own motion, entered an *ex parte* order vacating the order from which petitioner had appealed, and reinstated his order of November 3, 1954 (entered November 10, 1954), permitting petitioner to withdraw as plaintiffs' attorney.

Immediately subsequent to the entry of the order of February 15, 1955, from which petitioner prayed an appeal, but prior to the filing of her said Notice of Appeal, petitioner forwarded to plaintiffs on February 21, 1955, her bill for legal services rendered in connection with said *Lake Delton* case, showing 3800 hours of legal services rendered at $25.00 per hour, or a total of $95,000.00 (which said bill, with affidavit of mailing, was filed with the Clerk of the trial court on December 21, 1955 (App. 19), for the sole purpose of including the same in the record on ap-

peal to the Court of Appeals); that she did also, on February 25, 1955, forward to all of the defendants by registered mail, return receipt requested, her Notice of Attorney's Lien for services rendered and balance of costs advanced in connection with said *Lake Delton* case which Notice of Attorney's Lien was filed by her (together with her Notice of Appeal) with the Clerk of the trial Court on December 13, 1955 (App. 18) for the sole purpose of including the same in the record on appeal to the Court of Appeals; that such lien was served upon defendants pursuant to and in accordance with the provisions of Section 256.36 of the laws of the State of Wisconsin with reference to attorney's lien.

Said cause of *Fleming* v. *Lake Delton Development Co.* was called for trial before Judge Stone on September 20, 1955, and on the day following, was settled between the parties, at which time they entered into a settlement agreement and stipulation dated September 21, 1955, which was approved by Judge Stone (App. 8-9-10) that such stipulation provided that defendants would pay plaintiffs in full of all liability the sum of $32,500.00, in installments of $10,000.00 within 30 days, another $10,000.00 within 60 days, and the balance of $12,500.00 within one year from date of such settlement, all such payments to be deposited with the Clerk of the District Court, and that notice of such settlement be given respondent by James H. Hill, Jr., one of the defendants "so that the said Miss Borgmeier may take such steps as she may desire to enforce any lien which she may claim or assert herein"; that Mr. Hill duly gave such notice to petitioner.

The first payment of $10,000.00 was deposited by the defendants with the Clerk of the Court on October 11, 1955; and the second deposit of $10,000.00 was made November 8, 1955 (App. 12-13).

On November 9, 1955, an *ex parte* order was entered by Judge Stone, on motion of Frank M. Coyne with supporting affidavit of Geoffrey Fleming, acknowledged at Chicago, Illinois, on November 8, 1955, directing this petitioner to appear before the court on November 17, 1955, "and show cause, if any, why the alleged attorney's lien purported to have been filed in the above captioned matter should not be adjudicated or otherwise disposed of and upon adjudication of said alleged lien rights, monies now on deposit pursuant to settlement agreement dated September 21, 1955, should not be paid to the plaintiff; and that "a copy of this order together with the Petition of Geoffrey Fleming be served upon said Eleanore Borgmeier, Esq., by registered United States Mail with return receipt, said registered mail notice to be sent from the office of the Clerk of the United States District Court * * * said registered mail service to be made on said Eleanore Borgmeier at least ninety-six (96) hours prior to the aforementioned return date" (App 10, 11). Such notice was accordingly mailed by the Clerk of the United States District Court, but was not received by petitioner.

On November 17, 1955, (on the return of said rule to show cause entered against petitioner on November 9, 1955), Judge Stone entered an order determining that "due and sufficient service of said Order to Show Cause upon Eleanore Borgmeier, Esquire, has been effected and that there has been no appearance by her nor by anyone on her behalf and that the Court has jurisdiction to pass upon the aforementioned Order to Show Cause and application for distribution of funds by the plaintiffs", and ordering "that the present sum of $20,000.00 now on deposit with Edgar Alstad, Clerk of the above captioned District Court, pursuant to settlement agreement of September 21, 1955, be hereby released to the plaintiffs through their attorneys free from any lien of Attorney Eleanore Borgmeier, Esquire." (App. 13-14)

Said sum of $20,000.00 was thereupon immediately withdrawn by plaintiffs and their nominees from the possession of the Court.

On December 13, 1955, petitioner filed her Notice of Appeal to the Court of Appeals from said order of November 17, 1955 (App. 16), together with her appeal bond (App. 20); and thereafter, on December 21, 1955, filed her Designation of Contents (App. 22), her Statement of Points on Appeal (App. 20), and Statement in Accordance with Rule 10 (b) (App. 20). She likewise filed a motion on December 21, 1955 (without submitting herself to the jurisdiction of the trial court), to include the original transcripts of proceedings (App. 20).

She did also on December 13, 1955, file with the Clerk of the Court a copy of her Notice of Attorney's Lien served on defendants on February 25, 1955, in accordance with the Wisconsin statute relating to attorney's liens, Section 256.36; and on December 21, 1955, she did file with the Clerk of the Court a copy of her bill for moneys expended and legal services rendered which she had forwarded to defendants on February 21, 1955; both of which documents were filed with the Clerk for the sole purpose of including the same with the record on such appeal.

Thereafter, on motion and affidavits of Frank M. Coyne, Judge Stone did enter *ex parte* orders to show cause against petitioner on January 2, 1956 (App. 20), and on January 18, 1956 (App. 21), both of which orders were directed to be expunged by the mandate of the Court of Appeals in *Borgmeier* v. *Stone*, 233 Fed. 2nd 818. In accordance with this mandate, petitioner's appeal from the order entered by the trial court on November 17, 1955, was forwarded for review.

During the pendency of such appeal, the final payment of $12,500.00 required by the settlement agreement of

September 21, 1955, was deposited by the defendants with the Clerk of the District Court at Madison, and is now on deposit with said Court.

After the presentation of petitioner's appeal to the Court of Appeals from the trial court order of November 17, 1955, such order of November 17, 1955, was reversed in its entirety by the Court of Appeals in its opinion filed February 26, 1957.

Despite the fact that the sole question presented on that appeal was "Did the trial court have jurisdiction over appellant on November 17, 1955, at the time it entered the order appealed from?" (Brief and Appendix for Appellant, Page 10), yet the Court of Appeals voluntarily and on its own initiative remanded the cause to Judge Stone with directions "to proceed to determine the merits of appellant's claim for lien".

Petitioner assigned her said claim for moneys advanced and fees for legal services rendered, together with her claim for attorney's lien securing a part thereof, to Edmund J. Johnson, her husband, by written assignment dated dated March 26, 1955. Her assignee has elected to, and did file suit on March 26, 1957, on the *assumpsit* claim for moneys advanced and fees for legal services rendered, in the District Court of the United States for the Northern District of Illinois, Eastern Division, Case No. 57-C 551, entitled "*Edmund J. Johnson, Plaintiff* v. *Helen N. Fleming, et al., Defendants*". Said assignee joins in this Petition for the purpose of evidencing his ownership of said claim for moneys due and claim for attorney's lien, and for the further purpose of signifying his assent to this petition.

Petitioner herein prays that this Court review the action of the Court of Appeals in remanding said cause to Judge Stone for further determination.

ARGUMENT.

I.

Petitioner respectfully wishes to point out to this Court that the Court of Appeals erred in several instances in its opinion remanding the cause to the trial court to determine the attorney's lien of petitioner upon its merits.

Said opinion erred at Page 2 thereof, when it stated that the decision entered by the Court of Appeals in the antecedent mandamus and prohibition proceeding (*Borgmeier* v. *Stone*, 233 Fed. 2nd 818) "held merely that, after this appeal has been taken, the district court was without jurisdiction to enter further orders in the cause." That decision not only found that the orders to show cause entered by Judge Stone against petitioner on January 4, 1956, and January 17, 1956, again attempting to dismiss her attorney's lien (after petitioner had taken and perfected her appeal from his order of November 17, 1955) were void and should be expunged from the record, but also found that petitioner was a proper party to appeal, and directed that said appeal be forwarded for review, which Judge Stone had previously declined and refused to do. That decision likewise entered an order of prohibition against Judge Stone, directing him to cease from further action until the further order of the Court of Appeals.

In its opinion herein the Court of Appeals determined that the order entered on November 17, 1955, by the trial court was void and should be reversed, but then without any basis and of its own initiative arbitrarily made the *obiter* finding (upon which the direction to remand was based):

> "However, it appears that subsequent to the entry of the order of which complaint is made, on Decem-

> ber 21, 1955, plaintiff filed with the clerk of the district court her claim for lien upon the fund. * * * Inasmuch as appellant has now sought the aid of the court, and as the court has acquired jurisdiction both of the subject matter and of her person, it now has full authority to entertain and adjudicate her claim."

These findings of the court are in conflict with,

a) the previous parts of its opinion, where it says at Page 2, "She had taken no action in court to prosecute or perfect her claim for lien upon the fund", and where it further says at Page 3, "In view of the further fact that appellant had never filed any petition for relief in court, her alleged interest in the fund was in nowise before the court;" and

b) the facts set forth in the record. Petitioner (as admitted by the opinion) has not to this day taken any action in court, nor as she "filed any petition for relief in court" to prosecute or perfect her claim of lien. Such fact was also well recognized by the court of appeals in its opinion in the mandamus proceeding (and was also recognized by Judge Stone when he entered his orders of January 4, 1956, and January 17, 1956, and when he filed his "return" in said mandamus proceedings), when it said:

> "Respondent (Judge Stone) in his return herein admits that petitioner filed the notice of appeal and the other documents as steps in perfecting her appeal. He further admits that 'he declined to certify the record and instead issued an order' that she "consent to the jurisdiction' of the district court. Respondent had no right to impose any such condition in this connection."

Petitioner has never filed with the trial court a claim for lien, nor has she or her assignee taken any action in

court to enforce her lien. The document which the Court of Appeals herein referred to as petitioner's "claim for lien upon the fund" was in fact merely a copy of her notice of lien addressed to and served upon defendants on February 25, 1955, *dehors* the trial court proceedings, in accordance with Wisconsin statute, and which notice addressed to defendants was filed with the Clerk of the District Court on December 13, 1955, (together with petitioner's notice of appeal) as a necessary concommitant in perfecting her appeal (after the case in chief had been disposed of) for the sole purpose of including said document with the record on her appeal.

In order to become a party to the proceedings and enforce such lien, the attorney must actively seek the aid of the trial court by way of motion or intervention in the cause, and be granted leave to do so by the trial court, which action has not been taken by this petitioner. This is the usual course of procedure, and the one sanctioned by the United States Supreme Court (*Georgia R.R. & Banking Co. of Georgia* v. *Peltus*, 1884, 113 U.S. 116, 120; *Patrick* v. *Leach*, 1881, 17 Fed. 476.)

The Wisconsin attorney's lien statute does not afford the client a method of submitting the lien of his attorney for determination. Such attorney's lien statute must be strictly construed, and all action taken must be in conformity with its requirements. (*Smelker* v. *Chicago and Northwestern Ry. Co.*, Sup. Ct. Wis. 1900; 106 Wis. 135; 81 N.W. 994.

The rule of law is thus stated in 6 C.J., Attorney & Client, Sec. 419, Page 801; "In the absence of statute, otherwise providing, an attorney's lien can be enforced only by the attorney or his assignee".

In *Avery* v. *Avery*, 1893, 5 Misc. Rep. 75 24 N.Y. Sup. 737, the client attempted to enforce the attorney's lien

against the judgment debtor. There the court said, "The rights and interests of the client are in keeping of his attorney, and it is a sacred trust; but to hold conversely that the rights and interests of the attorney are in the keeping of his client would be a unique proposition indeed. The attorney personally is the necessary actor in the proceeding to enforce his own lien."

By its voluntary and gratuitous action in remanding the cause to the District Court, the Court of Appeals has chosen to ignore the approved course of procedure as enunciated in *Crawford* v. *Foster*, 1898, C.C.A. 7th, 84 Fed. 939, "The cause was brought to this court by Writ of Error, and we adhere to the view that the Court below having made no special findings of the facts, no question touching the merits which did not arise upon a ruling of the Court during the progress of the trial (that is to say, upon the hearing of the petition, can be considered."

Petitioner further submits that said notice filed by her after judgment to be included as a part of her appeal record, was not a part of the trial court record, under the doctrine of this court. *Sargeant* v. *St. Bak. Ind.*, 1851, 53 U.S. 371, Fed. Cas. 12360, 13 L. Ed. 1028; *England* v. *Gebhardt*, 1884, 112 U.S. 505, 5 S.Ct. 288, 28 L. Ed. 812; *Fisher* v. *Cockerell*, 1831, 5 Peters 248, 254; 8 L. Ed. 114.

In thus remanding the cause to the trial court, the Court of Appeals has also chosen to ignore its own statements appearing at Pages 2 and 3 of its opinion herein (*supra*); and has chosen to ignore the practice sanctioned by this court; and has also chosen to ignore the statutory requirements and practice of the State of Wisconsin.

In the instant case, since petitioner or her assignee has failed to submit her lien to the trial court for determination, that court is ~~without jurisdiction~~ to try the same;

and inasmuch as the Wisconsin statute does not permit the client to present the lien of his attorney to the trial court for determination, the client herein is limited to his action *in rem* under Chapter 23, U.S.C. Sec. 1655 Lien Enforcement, and the procedure specified by such statute.

II.

The sole question presented to the Court of Appeals herein was "Did the trial court have jurisdiction over appellant (this petitioner) on November 17, 1956, at the time it entered the order appealed from?" The Court of Appeals found that the trial court did not have such jurisdiction, but then capriciously and without basis remanded the cause to the trial court to determine the merits of petitioner's attorney's lien, which had not been submitted to the trial court by petitioner or her assignee, and which the trial court had already repeatedly disregarded.

Petitioner respectfully represents to the court that this action of the Court of Appeals, in view of the repeated actions of the trial judge, and in view of the Wisconsin statute, Secs. 256.36 and 256.37, and in view of the record in the cause, brings this application squarely within the supervisory provision of Rule 19 (b) of the Rules of this Court.

After petitioner had been discharged by plaintiffs as their attorney, and Judge Stone had permitted petitioner to withdraw of record, and her withdrawal had been filed, Judge Stone continually chose to ignore her attorney's lien and any rights petitioner might have, and repeatedly entered *ex parte* orders to show cause against her (no other kind ever being entered by him against her), and all without justification. Should she then be compelled to submit to the jurisdiction of the trial court without cause and against her wishes and consent, thus being deprived of her right of free choice?

Petitioner's withdrawal was filed on November 22, 1954. The first order entered against her by Judge Stone was on December 6, 1954, requiring her to show cause why she should not deliver up to plaintiffs or their agents all documents in her possession (which she had assembled by dint of laborious effort and large expenditures of money), to which order petitioner filed her special and limited appearance apprizing Judge Stone of her attorney's retaining lien in the sum of $10,004.96 (exclusive of services rendered in the *Lake Delton* case). (App. 5, 6).

Judge Stone chose to ignore Petitioner's lien, and instead, on January 25, 1955 (the return date as continued of his order of December 6, 1954) entered an order vacating that portion of his order permitting her to withdraw, and reinstated her as attorney for plaintiffs and compelling her to present herself to the Court on February 14, 1955, and although petitioner again filed her Special and Limited Appearance, setting forth her attorney's retaining lien, he did on the return day of such order to show cause (order dated February 15, 1955) again ignore her lien and reinstate her as attorney for plaintiffs and direct her to deposit with the Clerk of the Court all documents in her possession.

Petitioner filed her notice of appeal from Judge Stone's order of February 15, 1955, together with all necessary documents, and Judge Stone did thereupon on March 25, 1955, "on the Court's own motion", vacate his order of February 15, 1955, and reinstate his order permitting petitioner to withdraw as attorney.

Thereafter when the case came on for trial, a settlement agreement was entered into between the parties whereby the defendants agreed to pay the plaintiffs the ostensible and wholly inadequate sum of $32,500.00 in installments, to which agreement Judge Stone gave his consent, and

permitted defendants to withdraw the exhibit which disclosed the appraisal of the properties in 1936 at $764,171.00; and ordered the settlement installments to be paid into court, directing one of the defendants to notify petitioner of the settlement, which was done.

The second installment of $10,000.00 was deposited with the court on November 8, 1955, prior to its due date. By affidavit dated that same day at Chicago, the court entered an *ex parte* order against petitioner on the day following, November 9, 1955, requiring her to appear and show cause on November 17, 1955 "why moneys now on deposit should not be paid to plaintiffs", notice thereof being sent to her by registered mail, but not delivered. On the return day the court released the entire deposit from her lien, and on the same day $18,333.33 thereof was paid to the attorney for plaintiffs, the balance being paid out a short time later. This order of November 17, 1955, releasing the sum of $20,000.00, is the order appealed from which has now been reversed as void by the Court of Appeals.

After petitioner filed her notice of appeal from said order of November 17, 1955, Judge Stone refused to forward the appeal for review until compelled to do so by the order of mandamus obtained by petitioner; and although all of the moneys in the possession of the court had been disbursed under his order of November 17, 1955, yet Judge Stone did again and again, by *ex parte* orders to show cause dated January 2, 1956, and January 18, 1956, direct petitioner to submit to his jurisdiction for the purpose of determining her lien,—her lien on funds no longer in his possession and already disbursed by his order. These were the orders expunged by the mandamus proceeding.

Petitioner submits that these actions of Judge Stone indicate an unwillingness on his part to recognize her

lien, and that therefore it may well be presumed that he will not adopt an impartial attitude toward the merits of her lien.

Petitioner's charging lien herein is in the sum of $98,254.96. Notice thereof was given to the defendants *dehors* the trial court proceedings according to Wisconsin statute in February, 1955. The agreed settlement was ostensibly $32,500.00, of which $20,000.00 was paid into court by November 8, 1955, and $18,333.33 paid out on November 17, 1955 (the balance being paid out a few days later).

Since there were no funds on deposit with the trial court on December 13, 1955 (at the most the remainder of $12,500.00 was to be paid about one year later), when petitioner filed her notice of appeal herein together with copy of her Notice of attorney's lien in the sum of $98,004.06 as served on the defendants, for the sole purpose of including the same in the record on her appeal, can it be reasonably doubted that the Court of Appeals erred in its opinion herein when it remanded said cause, saying at Page 3, "Inasmuch as appellant has now sought the aid of the court"?

Petitioner submits that the record amply discloses that she has at no time submitted her claim for attorney's lien to the trial court for determination, nor have her actions indicated any intention to do so; on the contrary, her actions have consistently evidenced a refusal to submit said claim to Judge Stone for determination. Upon what has she ever been able to, or can she, impress a lien amounting to $98,004.96?

Petitioner's claim for debt against the plaintiffs in the sum of $105,004.96, as well as her attorney's charging lien herein in the sum of $98,004.96, was assigned by her on

March 26, 1955, to Edmund J. Johnson, and she has at no time since that date had any legal right to sue upon the obligation nor to submit any claim for lien to the trial Court herein nor to any other tribunal.

Petitioner submit that the arbitrary and improper action of the Court of Appeals in remanding the merits of petitioner's lien to Judge Stone, in view of his repeated conduct in suppressing said lien, and in view of petitioner's continuous insistence on her jurisdictional claims, and her refusal to waive the same, brings this cause within the supervisory provisions of Rule 19 (b).

III.

The point of law presented herein is submitted to this Court under the provisions of Rule 19 (b), Rules of Supreme Court. That point of law, "When does a party become subject to the jurisdiction of the court" has been raised solely by the opinion of the Court of Appeals herein, when it remanded the cause to the trial court. It raises an important question of practice, about which the decisions are not uniform, and which should be settled by this court.

The present status of the decisions was stated by Justice Holmes in *Merchants Heat & Light Co.* v. *J. B. Clow & Sons*, 1907, 204 U.S. 286; 27 S. Ct. 285; 51 L. Ed. 488, at 490:

> "There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits."

In that case the defendant answered to the merits and filed a recoupment, hence became an actor. This case was cited and followed in *U. S.* v. *Collins, et al.*, C.C.A. 2nd, 1932,

55 Fed. 2nd, 70, where it was said, "The true test is what is done by way of participation in the action."

The general rule of law is set forth in Corpus Juris Secundum (6 C.J.S., Appearances, Sec. 1, Page 4, note 1) as follows:

> "Appearance means the coming into court as a party in a proceeding and asking relief in the progress of the cause. *Everett Ry. Light & Power Co.* v. *U.S.*, D.C. Wash.; 236 Fed. 806, 808."

And at Page 5:

> "An appearance is general where it is an absolute submission to the jurisdiction of the court (*Bacon* v. *Fed. Res. Bk.*, D.C. Wash.; 289 Fed. 513) or defendant takes any substantive step in the proceedings, or as noticed in Sec. 13 *infra* does some act which recognizes the case as in court which is made or done for any purpose other than to question the jurisdiction thereof and which bears some substantial relation to the cause. Such appearance must be express, as noted in Sections 11 and 12 *infra*, or must arise by implication from defendant seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other than one contesting the jurisdiction only."

And at Page 7:

> "It is what the appearing party does rather than what he says that counts (*U.S.* v. *Collins*, C.C.A.N.Y., 55 Fed. 2nd 70), or as is frequently declared, the Court in determining whether a given appearance is general or special will always look to the substance and the state of the record rather than the form of the appearance."

And at Page 9,

> "At any rate if the declared purpose is to make a special appearance and the appearing party's acts and pleadings tend to show that his sole purpose was

to question the Court's jurisdiction, the Court will not enlarge the appearance and make it general by reason of slight inconsistencies, but will give regard to the party's apparent intent (*Dahlgren* v. *Pierce*, C.C.A. Ohio, 263 Fed. 841) for the extent to which defendant submits himself to the jurisdiction when he thus voluntarily comes in is determined by his own consent."

The applicable rule of law is also stated in 3 American Jurisprudence, Page 787, Section 10:

"A general appearance may arise by implication from the defendant's seeking, taking, or agreeing to some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only. The purpose of the appearance, however, must bear some substantial relation to the cause. In other words, it must be a purpose within the cause, not merely collateral thereto. It has been said that the test of a general appearance conferring jurisdiction over the person is whether or not the defendant becomes and actor in the cause. But there is a difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction. In determining the character of an appearance, the Court will always look to matters of substance rather than to matters of form. * * * In some cases it is said that the question whether there has been a general appearance so as to confer jurisdiction over the person of a defendant is one of intent as evidenced by conduct. The instances of the assumption of the role of actor in a suit are such as the taking of a continuance, filing a demurrer to plaintiff's pleading without limiting it to the question of jurisdiction, pleading to issue or to the merits in the first instance, filing set-offs, counter-claims, or notices of recoupment; filing exceptions in a cause, or filing a plea of intervention."

Presenting motions to the court and obtaining orders thereon also constitute action within the cause. All of the text authorities agree on this statement of the law.

Corpus Juris, Volume 4, Appearances, Page 1317, Section 4, sets forth the fundamental consideration in determining the nature of an appearance when it says, "Whether an appearance is general or special is to be determined from the relief asked, and in reaching its conclusion, the Court will always look to matters of substance, rather than form".

The principle of intent, the true test, is laid down in *Citizens Savings & Trust Co. v. Illinois Central R.R.*, 1906, 205 U.S. 46, 27 S. Ct. 425, 51 L. Ed. 703 at 708. This was a bill to remove a lien on property in Illinois, within the jurisdiction of the court, although the defendants were domiciled in other Federal districts within the state. The defendants appeared specially and protested the jurisdiction. The opinion of Mr. Justice Harlan states, "The plaintiff contends that this condition was waived, and the general appearance of the defendants entered, when their counsel, at the hearing as to the sufficiency of the pleas to the jurisdiction, argued the merits of the case as disclosed by the bill. This is too harsh an interpretation of what occurred in the Court below. There was no motion for the dismissal of the bill for want of equity. The discussion of the merits was permitted or invited by the Court in order that it might be informed on that question in the event it concluded to consider the merits along with the question of the sufficiency of the plea to the jurisdiction. We are satisfied that the defendants did not intend to waive the benefit of their qualified appearance at the time of filing the plea to the jurisdiction." This opinion was cited and followed in *Dahlgren v. Pierce*, 1920, C.C.A.

6th, 263 Fed. 841, wherein argument on the merits was indulged in by the attorney who had appeared specially, and it was contended that such action waived the special appearance, the Court saying, "The conduct which will make the motion unavailing and destroy its basis must be clear and unequivocal. * * * and unless there is a rule of law imperatively declaring such a waiver, it ought not to be found from the circumstances of the case. We find no persuasive holding that such a waiver must be inferred, and we refer to some of the cases cited by appellee in support of such an inference, merely to show how far they are from having such supposed effect."

Durabilt Steel Locker Co. v. *Berger Mfg. Co.*, 1927, 21 Fed. 2nd. 139, citing *Dahlgren* v. *Pierce*, *supra*, is to the same effect, the court saying, "Waiver by intention is always a matter of intention and is not to be inferred, except as the result of acts from which an intent may be properly inferred".

In *Grable* v. *Killits*, 1922, C.C.A. 6th, 282 Fed. 185 (cert. denied, 260 U.S. 735, 32 S. Ct. 95, 67 L. Ed. 488), defendants not only appeared specially, but thereafter presented several motions to the court, to dismiss the proceeding, to dismiss the bill, and they resisted restraining orders. The court said, "Here defendants disclaimed in the most solemn manner all intention of entering an appearance except for filing and presenting that motion; they protested that the Court had no jurisdiction over them "in their individual or representative capacities". Nothing could be clearer than an intent not to appear generally. If our conclusion as to the effect of the first motion is correct, clearly the subsequent motion to dismiss the answer upon the merits did not amount to a general appearance. After defendants had done all they

could to avoid personal jurisdiction, they were at liberty to present meritorious defenses and without losing the benefit of the formal motion, so long as they persisted in their protests against personal jurisdiction."

Harkness v. *Hyde*, 1878, 98 U. S. 476; frequently cited, states as follows, "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being waged it is overruled; and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

This principle of law has also been adopted and recognized by the Supreme Court of Wisconsin, and is enunciated in the case of *State ex rel. Cronkhite* v. *Belden*, 1927, 193 Wis. 145, 211 N.W. 916 at 921; 47 A.L.R. 1218, as follows, "The appearance must be in the action, and it must be by entry of record, by motion, plea, or answer filed, by the making of a stipulation therein; and no doubt in other ways", thus meaning affirmative action taken in the cause.

The broad attitude of the Federal courts tending to give emphasis to the intention of the party, to the substance rather than form, is stated in *Romaine* v. *Union Insurance Co.*, 1886, Cir., Ct. W.D. Tenn., 28 Fed. 625; at 638; "If a special appearance is desired, it seems to be accomplished by some mere statement of counsel that he so appears, or is left to implication from the steps he takes; and wherever the fact appears that he so limits his appearance, no matter how, no courts are

more liberal than the Federal Courts—and all are so—in giving effect to that intention, without regard to any technical requirement of the practice in that behalf. *Harkness* v. *Hyde*, 98 U.S. 476."

Petitioner therefore submits that this court should definitively determine the question herein presented, so as to establish a general rule of fundamental and necessary practice.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDMUND J. JOHNSON AND
E. R. BORGMEIER,
Attorneys for Petitioner.

E. R. BORGMEIER,
Of Counsel.

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 14675. October Term, 1955. April Session, 1956.

E. R. Borgmeier, also known as Eleanor B. Johnson,
Petitioner,
v.
Patrick T. Stone, as Judge of the United States District Court for the Western District of Wisconsin,
Respondent.

On Petition for Writ of Mandamus and Writ of Prohibition.

May 11, 1956.

Before Finnegan, Swaim and Schnackenberg, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* Pursuant to leave granted, petitioner has filed herein a petition for writ of mandamus and writ of prohibition directed to respondent. To that petition respondent has filed a "return", to which petitioner has filed a reply. All of these documents are verified. There does not appear to be any material disagreement as to the relevant facts.

Petitioner, a Chicago lawyer, on May 21, 1953, filed a civil action in the District Court of the United States for the Western District of Wisconsin, entitled *Helen N. Fleming, et al.* v. *Lake Delton Development Commpany, et al.*, bearing number 2465-Civil.

On November 22, 1954 petitioner filed a withdrawal as attorney for plaintiffs in the clerk's office of said court, pursuant to leave granted on November 3, 1954 by respondent.

On or about February 25, 1955, petitioner served upon defendants a notice of an attorney's lien claimed by her upon the cause of action involved in *Helen N. Fleming, et al.* v. *Lake Delton Development Company, et al.* and upon the proceeds or damages derived in said action, as security for her fees in the conduct of such litigation, pursuant to § 256.36 of Wisconsin Statutes (1953).

When the case of *Helen N. Fleming, et al.* v. *Lake Delton Development Company, et al.* was reached for trial on September 30, 1955, the parties agreed upon a settlement under the terms of which defendants were to pay $32,500 to plaintiffs by deposits with the clerk of the court as follows: $10,000 in 30 days; $10,000 in 60 days and $12,500 within one year. An order was entered by respondent on that date directing that petitioner be given notice of such settlement "so that she could take such steps as she might desire to enforce any lien which she might claim or assert to such funds." Two deposits of $10,000 each were made with the clerk by the defendants according to the agreement.

On November 9, 1955, respondent entered a rule directing petitioner to show cause why the moneys on deposit should not be distributed free of her lien, and directing that notice of the rule be served on her by the clerk by registered mail, returnable November 17, 1955. On the latter date respondent entered an order to the effect that due and sufficient service of said rule to show cause was served on petitioner and which order directed that the moneys on deposit[1] should be paid by the clerk to plaintiffs' attorney, free of any lien of petitioner.

Petitioner was not present when any of the aforesaid proceedings before respondent took place.

On December 14, 1955, she filed a notice of appeal to this court from the order of November 17, 1955, and also

1. Except a part thereof to be held to answer a garnishment proceeding against one of the plaintiffs.

in due time filed Designation of Contents, Statement of Points on Appeal, and Statement in accordance with Rule 10(b). She also presented a motion requesting that original reports of proceedings be included in the record for appeal, and thereafter forwarded true copies of necessary documents to be included by the clerk in the record, requesting the clerk to certify the record and forward it to her for filing in this court.

By order dated January 2, 1956 and entered January 4, 1956, respondent entererd a rule to show cause, returnable January 17, 1956, (continued on January 17, 1956 to January 31, 1956) which provided that,—"upon the failure of E. R. Borgmeier, Esquire, to submit herself to the jurisdiction of this Court for the determination of the validity of said alleged lien, or the merits of said lien rights, that the purported appeal taken by E. R. Borgmeier from the order entered on this Court on the 17th day of November, 1955, shall be dismissed upon its merits with prejudice, and further, that the alleged lien, and any lien rights arising thereunder, shall be dismissed with prejudice and the proceeds of the settlement disbursed to the plaintiffs free from any incumbrance of said alleged lien or any lien rights."

Petitioner forwarded to the clerk of the district court "for Judge Stone's consideration and signature," a motion and order to extend to February 20, 1956, the time within which to file record on appeal.

A motion for leave to file the petition now before us was filed in this court on January 30, 1956.

1. We have jurisdiction to issue extraordinary writs in aid of our appellate jurisdiction. Section 1651(a), Title 28 U. S. C. A. Our authority to issue such writs is that which may properly be deemed to be auxiliary to our appellate power. *United States* v. *Mayer*, 235 U. S. 55, 59 L. Ed. 129.

2. Petitioner has appealed from respondent's order of November 17, 1955 which directed the release of plaintiffs' moneys held by the clerk of the district court and upon which moneys petitioner then claimed an attorney's

lien under the statutory law of Wisconsin.[2] This order implicitly holds her lien to be ineffectual as to the moneys then in the hands of the clerks, and is, therefore, an appealable order.

3. Respondent contends that petitioner is not a party to the proceeding and, therefore, she has no right of appeal.[3] The district court recognized that she was a party to the proceeding by directing that notice be served upon her, and by finding that it had been served prior to the entry of the order of November 17, 1955. It is self-evident that when a fund upon which an attorney claims a statutory lien is being released from that lien, the attorney is a party to that proceeding and is entitled to appeal from an adverse order.

4. Respondent also argues that petitioner lost any right to appeal "by staying outside the jurisdiction". We have been cited to no authority holding that a party to a civil proceeding loses her right of appeal from an adverse decision simply because she is physically absent from the geographical jurisdiction of the court. We hold to the contrary.

5. After petitioner filed a notice of appeal on December 14, 1955, respondent had no jurisdiction to enter any orders in said case, except in pursuance of Rules 73, 75 and 76 of the Rules of Civil Procedure.[4] His aforesaid orders entered on January 4, 1956 and January 17, 1956 were entered without any authority and they should be expunged from the record.

Respondent in his return herein admits that petitioner filed the notice of appeal and the other documents as steps in perfecting her appeal. He further admits that "he declined to certify the record and instead issued an order" that she "consent to the jurisdiction" of the district court.

Respondent had no right to impose any such condition in this connection.

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2. Wisconsin Statutes (1953), § 256.36.

3. "A party may appeal from a judgment by filing with the district court a notice of appeal." Rule 73(a), Rules of Civil Procedure.

4. 28 U. S. C. A., Rules 73, 75 and 76.

Except as hereinbefore set forth, we express no opinion as to petitioner's right to maintain the present appeal, or as to the merits thereof.

In accordance with the views herein set forth, a writ of prohibition will issue forthwith from this court directed to the respondent commanding him to desist from any further proceedings against petitioner in case No. 2465-Civil, entitled *Helen N. Fleming, et al.* v. *Lake Delton Development Company, et al.*, in the United States District Court for the Western District of Wisconsin, except as hereinafter provided, until the further order of this court; and, further, a writ of mandamus will issue forthwith directed to the respondent, commanding him to (a) expunge the orders entered by him on January 4, 1956 and January 17, 1956, in said case, (b) pass upon any motions addressed to him by petitioner and incidental to the perfection of her appeal and the filing in this court of the record thereon, and (c) direct the clerk of said district court, upon payment of his proper charges therefor, to authenticate said record when completed and forward it to petitioner for filing with the clerk of this court.

We reserve jurisdiction to pass upon any motion by petitioner for leave to file said authenticated record in the office of the clerk of this court.

Finnegan, *Circuit Judge*. I concur only to the following extent shown by my separate opinion. The order granting Borgmeier leave to file her petition for mandamus also stayed the proceedings in *Helen N. Fleming, et al.* v. *Lake Delton Development Company*, No. 2465 "until the final disposition of this petition." Our purported retention of jurisdiction, even for limited purposes, injects another difficulty into this case for anyone determining when and if Borgmeier's petition is finally disposed of. If the stay is extended we ought to say so in unequivocal language. I think the relief granted under the form of a writ of prohibition collides with our simultaneous command to the trial judge under which he must now "pass upon any motions addressed to him by petitioner and incidental to the perfection of her appeal and the filing in this court of the record therein." I would only direct certification

of the record and continue the stay of proceedings in No. 2465 until Borgmeier perfects her appeal and we dispose of it on the merits. This review could be expedited and dilatory tactics penalized. We need only remind the trial judge that he lost jurisdiction when the notice of appeal was filed, save as to the mechanical procedural matters he is now directed to perform.

I cannot join in an opinion or mandate forbidding this district judge to desist "from *any* further proceedings against (this) petitioner." Such a command subjugates the trial judge to the litigant.

APPENDIX B

241 Fed. 2nd 865

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11873 September Term 1956, January Session 1957

Helen N. Fleming, William J. Newman, Jr., Margaret N. Walsh, Richard P. Newman, Josephine N. Krug, Adelaide Loiacano, and William McKavis, a minor, by Helen N. Fleming, his next friend,
Plaintiffs-Appellees,
v.
Lake Delton Development Company, a Wisconsin Corporation, Ralph M. Hines, James H. Hill, Sr., Hilmer C. Amundson and Henry C. Titus,
Defendants-Appellees,
and
James H. Hill, Jr., Millie M. Risley, Frances Hines and A. B. Batty,
Impleaded Defendants-Appellees.
On Appeal of E. R. Borgmeier,
Respondent-Appellant.

On Appeal from order entered November 17, 1955, in the District Court for the Western District of Wisconsin.

February 26, 1957

Before Duffy, *Chief Judge*, Lindley and Swaim, *Circuit Judges.*

Lindley, *Circuit Judge.* Since the questions presented in this appeal involve facts many of which were related in our earlier decision in *Borgmeier* v. *Stone*, 233 F. 2d 815, we shall attempt to avoid unnecessary repetition. However, that opinion held merely that, after this appeal had been taken, the district court was without jurisdiction to enter further orders in the cause.

In this appeal appellant, a resident of Illinois, seeks to set aside an order entered November 17, 1955, wherein the district court in Wisconsin disposed of her claim for an attorney's lien upon $32,500 deposited as a result of settlement of the litigation, with the clerk of the court. She had been attorney for plaintiffs, but, by order of court, had withdrawn her appearance and was no longer counsel of record. However, she had served notice of a lien, as former attorney for plaintiffs, for $95,000 upon defendants. She had taken no action in court to prosecute or perfect her claim of lien upon the fund. In this situation the court directed that notice be given to her by registered mail to show cause why she should not appear and prosecute her claim for lien. This registered letter was returned by the postal service unopened, as a result of inability to find her at her last known address, or to deliver the letter personally. Thereupon the court held that it had jurisdiction of appellant by virtue of these facts, and, on November 17, 1955, directed that $20,000 of the fund be released and delivered by the clerk to plaintiffs, appellant's former clients, without regard to the latter's claim of lien. From that order this appeal was taken.

It is clear that the court had no jurisdiction of the person of appellant, even though the fund was in its custody. She might have been served, as provided by the Rules of Federal Procedure, as an attorney, prior to her withdrawal as counsel for the plaintiffs, but, after that, she could no longer be reached by such notice. Consequently, the question is presented as to whether the court acquired jurisdiction of her or her rights by virtue of the returned registered mail notice.

When appellant notified defendants of her claim for lien, she might have filed it as an interpleader in the cause. This she did not do. The defendants, having been served with notice of lien, could only at their peril dispose of

the fund upon which they had been notified she claimed a lien. They might have brought her in as a party claiming an interest in the fund with proper service; and plaintiffs likewise might have made her a party and had her served as one interested. Furthermore, defendants might have filed a suit of interpleader against both plaintiffs and appellant, as a stake holder of the fund, requesting the court to determine the rights and interests of all parties. This they did not do. Again, plaintiffs might have invoked the provisions of 28 U.S.C., § 1655, which provides that a suitor may file in the district court a suit to establish a lien upon, or to remove clouds from, the title to property within the district and that the court, having jurisdiction of the *res* may acquire jurisdiction by giving notice to a non-resident for the purpose of determining such interest, if any he has, in the *res*. To obtain jurisdiction in such matters, it is necessary that the court have jurisdiction of the *res* and that notice be given to non-resident claimants in the specific manner and form there provided. However, there was no attempt by plaintiffs, defendants or appellant to invoke any of these remedies or follow any of these procedures. Instead, the court ordered a notice sent to her in a manner not provided by statute or rules, and, by an order of which she was not notified, freed $20,000 of the fund from her claim of lien and ordered it paid to plaintiffs. This, we think, was beyond the court's jurisdiction. In view of the further fact that appellant had never filed any petition for relief in court, her alleged interest in the fund was in nowise before the court; as a consequence, the order is void. No court may properly subject a person to its jurisdiction by merely notifying him by an undelivered letter directing him to come to court, in the absence of statutory basis for such procedure.

However, it appears that, subsequent to the entry of the order of which complaint is made, on December 21, 1955, plaintiff filed with the clerk of the district court her claim for lien upon the fund. Of course, the jurisdiction of the court based thereon must date from the day of the filing and not from something that happened before she became a party.

Inasmuch as appellant has now sought the aid of the court, and as the court has acquired jurisdiction both of the subject matter and of her person, it now has full authority to entertain and adjudicate her claim. Whether issues have been drawn by way of answer or otherwise, we do not know, but, obviously, the court will afford all interested parties opportunity to contest the legality of her claim.

We do not pass upon the validity of the claim. As the merits have never been presented, they are beyond the purview of this disposition.

The order of November 17, 1955, from which the appeal is taken, is declared void and vacated and the cause remanded to the district court with directions to proceed to determine the merits of appellant's claim for lien after the issues pertaining thereto have been properly joined.

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, March 27, 1957

Before

Hon. F. Ryan Duffy, Chief Judge

Hon. Walter C. Lindley, Circuit Judge

Hon. H. Nathan Swaim, Circuit Judge

Helen N. Fleming, et al., Plaintiffs, vs. Lake Delton Development Company, et al., Defendants, and James H. Hill, Jr., et al., Impleaded Defendants. E. R. Borgmeier, Respondent-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin.
No. 11873	

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

(Envelope of the Clerk, United States Court of Appeals, for the Seventh Circuit, 1212 Lake Shore Drive, Chicago 10, Official Business, addressed to Mrs. E. R. Borgmeier, 500 Illinois Street, Lemont, Illinois, bearing U. S. Postal cancellation stamp, Chicago, Ill., Mar. 27, 1957, 7 PM.)

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Tuesday, April 2, 1957

Before

Hon. Walter C. Lindley, Circuit Judge

Helen N. Fleming, et al., Plaintiffs. vs. Lake Delton Development Company, et al., Defendants, and James H. Hill, Jr., et al., Impleaded Defendants. E. R. Borgmeier, Respondent-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin.

No. 11873

On motion of E. R. Borgmeier, Respondent-Appellant, pro se, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby stayed, pursuant to the provisions of Rule 28 of the Rules of this Court.

(Envelope of the Clerk, United States Court of Appeals, for the Seventh Circuit, 1212 Lake Shore Drive, Chicago 10, Official Business, addressed to Mrs. E. R. Borgmeier, 500 Illinois Street, Lemont, Illinois, bearing U. S. Postal cancellation stamp, Chicago, Ill., Apr. 2, 1957, 7 PM.)